

2962
No. 246.7

In The ³
**United States Circuit Court
of Appeals
For the Ninth Circuit**

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

SNOHOMISH RIVER BOOM COMPANY,
a corporation, and EVERETT
IMPROVEMENT COMPANY,
a corporation,
Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN
DIVISION.

HON. JEREMIAH NETERER, Judge. Filed

Brief of Defendants in Error

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STATEMENT OF THE CASE.

This action of ejectment, tried without a jury,
was at the conclusion of the case of the plaintiff
in error dismissed upon motion of the defendants

in error, on the ground that the plaintiff in error had failed to establish its ownership or right to possession of the tide lands involved.

The facts are undisputed. Most of them relate to geographical and historical matters within the judicial knowledge of the court. Briefly they are as follows: The treaty between the United States and certain Indian tribes, which is set forth in 12 U. S. Statutes at Large, 927 et seq., was concluded on January 22, 1855, and proclaimed April 11, 1859. By its terms the several Indian tribes therein mentioned ceded, relinquished and conveyed to the United States all their right, title and interest in and to a large part of the Northwestern portion of what is now the State of Washington. In regard to the Tulalip Indian Reservation the treaty contained the following:

“Article 3. There is also reserved from out of the lands hereby ceded the amount of thirty-six sections, or one township of land, on the Northwestern shore of Port Gardner and north of the mouth of the Snohomish River, including Tulalip Bay and the aforesaid mentioned Kwilt Ceda Creek for the purpose of

establishing thereon an agricultural and industrial school * * *."

The reference to the Kwilt Ceda is contained in Article II of the treaty and is as follows:

"There is, however, reserved for the present use and occupation for said tribes and bands, the following tracts of lands, viz: * * * the amount of two sections or 1280 acres, on the north side of Hwhomish Bay and the creek emptying into the same called Kwilt Ceda, * * *."

On December 23, 1873, President Grant by an executive order defined and described the boundaries of the Tulalip Indian Reservation as follows:

"Beginning at low water mark on the north shore of Steamboat Slough at a point where the section line between Sections 32 and 33 of township 30 north, range 5 east intersects the same; thence north on the line between sections 32 and 33, 28 and 29, 20 and 21, 16 and 17, 8 and 9, and 4 and 5 to the township line between townships 30 and 31; thence west on said township line to low water mark on the shore of Port Susan; thence Southeasterly with the line of low water mark along said

shore and the shores of Tulalip Bay and Port Gardner, with all the meanders thereof, and across the mouth of Ebey's Slough, to the place of beginning."

The United States caused a survey of the Tulalip Indian Reservation to be made, the work of which commenced August 6, 1873, and continued until May 22, 1874. Trans, 39. Based on that survey an official map was made, an exemplified copy of which is in the record, marked plaintiff's Exhibit No. 1. The field notes of this survey are in the evidence, marked plaintiff's Exhibit No. 3. Trans. 45 and 46. There is also in the evidence a map (plaintiff's Exhibit No. 2), upon which these field notes have been platted, and this exhibit also shows the tide land area deeded by the State of Washington to the predecessors in interest of the defendants. Trans. 46. This exhibit shows Smith Island. The blue line shows the tide lands attached to Smith Island, which tide lands are covered and uncovered daily by the tide. Trans. 48. It is that part of these tide lands which are colored black on the diagram attached to Judge Neterer's memorandum decision, (Trans. 18), that are the subject

of this controversy. That portion of these tide lands do not form an island as one might suppose, if looking only at said diagram for information. That part of the tide lands shown by the dark coloring on the diagram are only a part of a larger tract, which attaches to Smith Island. This is made clear by an examination of the plaintiff's Exhibit 2. On this exhibit the line of the field notes is indicated in red. To avoid confusion, it may be necessary to explain that the red line around Smith Island and the land south of the Snohomish River has nothing to do with the Reservation, as Smith Island and that land admittedly are not within the boundaries of the Reservation. The purpose in showing Smith Island on that exhibit was to show that the tide lands in dispute attach to Smith Island, and do not attach to any part of the upland of the Indian Reservation. These tide lands are enclosed by blue lines on said plat. It is not disputed that there is a deep water navigable channel between said tide lands and the upland of the Reservation.

It is admitted, because affirmatively pleaded in the answer and not denied by the reply, (Trans.

10-15), that at the time of the admission of the State of Washington into the Union the tide lands involved in this litigation were under the tide waters and within the limits of said state, and thereupon became the property of said state, and that on February 4, 1893, the State of Washington, for a valuable consideration and pursuant to the laws of said state, granted and conveyed to the Everett Land Company certain tide lands, which are appurtenant to Smith Island, (not a part of said Indian Reservation), and that the tide lands in dispute herein are a part of the tide lands so conveyed by the State of Washington to said company, and that the defendant Everett Improvement Company by several mesne conveyances from the Everett Land Company has become and now is the owner of the tide lands described in the complaint and that it has leased a portion thereof to the defendant Snohomish River Boom Company. It was alleged in the complaint that the tide lands in dispute had grown up since the date of the executive order, but the Government offered no proof to sustain that allegation, but on the con-

trary admitted upon the trial that these tide lands which admittedly attach to uplands not a part of the Indian Reservation, had been in existence so long that the memory of man runneth not to the contrary. Trans. 47, 48.

THE QUESTION IN DISPUTE.

The Government bases its contention that the tide lands involved herein are within the boundaries of the Tulalip Indian Reservation solely upon its construction of the language "and across the mouth of Ebey Slough, to the place of beginning," contained in the executive order describing the boundaries of the Reservation. There is no question about the east boundary, or about the north boundary, or about the westerly boundary of the Reservation. The dispute arises over the southerly boundary. The Government contends that the words "across the mouth of Ebey Slough, to the place of beginning," describe a straight line from the point of low water at the southermost point of the Reservation eastward and slightly northward to the southeast corner of the Reservation, which latter corner is on Steamboat Slough,

and about a mile directly south of Ebey Slough. See plaintiff's Exhibit 1. This contention is based solely on the use of the word "southeasterly," it being contended that when the line of the westerly boundary of the Reservation ceases to run southeasterly it ends, and that the description must be closed by a straight line from that point to the place of beginning. The contention of the defendants is that the mouth of Ebey Slough is as indicated in the Government field notes, and that the southerly boundary of the Reservation is about a mile north of the north boundary of the tide lands in dispute herein.

The plaintiff in error also urges for the first time in its brief that notwithstanding the fact that the tide lands in dispute may lie outside of the boundaries of the Indian Reservation, they are nevertheless a part of the Reservation because of their tide land character, notwithstanding the admitted fact that these tide lands are not attached to any part of the upland of the Reservation, but are attached to upland admittedly not within the Reservation, and notwithstanding the further ad-

mitted fact that there is a deep water navigable channel between these tide lands and any upland of the Reservation. The mere statement of this proposition shows its unsoundness.

ARGUMENT.

The Boundaries of the Indian Reservation

It seems to me that the contention of the government to the effect that the southerly boundary of the Reservation is a straight line from the point of low water at the southermost point of the Reservation to the southeast corner of the Reservation cannot be sustained for the following reasons: (for convenience sake we will refer to said boundary as the "straight line").

1. To sustain it would imply that the place of beginning was on Ebey Slough, when as a matter of fact, accordig to all the maps in evidence, the place of beginning is not on Ebey Slough but on Steamboat Slough and nearly a mile from the nearest point on Ebey Slough.
2. To sustain it would imply that Ebey Slough extends south at least to said "straight

line," when as shown by all the maps in evidence Ebey Slough is but one of several mouths of the Snohomish river, namely: Ebey Slough, Steamboat Slough, Union Slough, and the main river, all of which empty into Port Gardner. Ebey Slough is the mouth of the river farthest north. About a mile south of it is Steamboat Slough. The said "straight line" contended for by the government does not run near Ebey Slough, but runs into Steamboat Slough;

3. The said "straight line" contended for by the Government is inconsistent with the field notes of the Reservation, which specifically fixes the mouth of Ebey Slough and so designated it about a mile north of said "straight line." See Exhibit 3;

4. The establishment of said "straight line" as the boundary of the Reservation would include within the boundaries of the Reservation a large body of water. That this was not intended is apparent from the fact that such was not provided for in the treaty, which by its terms did include Tulalip Bay, and the Kwilt Ceda creek;

5. The treaty gave to the Indians thirty-six sections of land, but no water except Tulalip Bay and Kwilt Ceda creek. The actual quantity of land, including all water included in the Reservation, as shown by the official map, (Exhibit 2), is 22489.91 acres, which is a quantity more than four hundred acres in excess of thirty-six sections. To establish the said "straight line" as a boundary would give the Indians an additional bay as large as Tulalip Bay;

6. It is apparent from the executive order that it was the intention of the Government to give to the Indians a township of *land including the tide lands adjoining* for the boundary on the water side is low water mark. The tide lands in dispute herein, however, did not attach to or adjoining any of the upland of the Reservation, but did attach to Smith Island. See Exhibit 3. There is a navigable channel between the tide lands in dispute and the Reservation upland;

7. An inspection of the official map of the Reservation (Exhibit 2), shows that the tide lands in dispute are not included in the Reservation;

8. The argument of counsel for the Government to the effect that because the course named in the description in the executive order of the western boundary of the Reservation is southeasterly that the boundary must run from where the line of low water mark would cease to continue in a southeasterly direction, in a "straight line" to the point of beginning, is not sound for several reasons. If the language, "thence southeasterly with the line of low water mark along said shore and the shores of Tulalip Bay and Port Gardner, with all the meanders thereof, etc," would require a continuous southeasterly course, then the meandering of Tulalip Bay is entirely wrong, because to run around the Bay would require not only a southeasterly course but a northwesterly course. Aside from that, however, the plain language of the description in the executive order is not susceptible of the construction placed upon it by counsel for the Government. That language requires that the boundary line be run along the shore of Port Susan and the shores of Tulalip Bay and Port Gardner, *with all the meanders thereof*, to the place of beginning. By reason of the fact

that Ebey Slough empties into Port Gardner, the meanderings of that body of water would be lost before the place of beginning could be reached, and therefore, it became necessary to insert in the description contained in the executive order the direction to cross Ebey Slough. The punctuation of the description contained in the executive order shows that the words "and across the mouth of Ebey Slough," constitute a parenthetical phrase. It is true that the words are not enclosed in parenthesis, but there is a comma at each end thereof, which gives the language the same effect as though they were enclosed in parenthesis. It being true therefore that the description contained in the executive order requires the line of the water boundary of the Reservation to be run coincident with the line of low water mark along the shores of Port Susan, Tulalip Bay and Port Gardner, with all the meandering thereof, the only thing left for the court to determine is how far north towards Ebey Slough and the Kwilt Ceda creek, Port Gardner extends. If it extends north of the tide lands in question, then manifestly the plaintiff has no case. An inspection of any map in evidence or of any other map of the

locality will show that the mouth of Ebey Slough is at least a mile north of the tide lands in dispute, and will also show that Port Gardner extends a long distance north of said tide lands. Steamboat Slough is separated from Ebey Slough by land about a mile in width. The latter slough is just as important a branch of the Snohomish River and just as big as Ebey Slough. It is nearly a mile south of Ebey Slough, and the "straight line" contended for by the Government as the boundary of the Reservation does not run into Ebey Slough at all, but does run into Steamboat Slough. Manifestly therefore, the tide lands in dispute are not in the waters of Ebey Slough, but are in the waters of Port Gardner.

Defendants' Contention As To Boundary

The defendants contend that the tide lands in dispute are not in Ebey Slough or in the mouth thereof, but that they are in Port Gardner, into which Ebey Slough, Steamboat Slough, Union Slough, and the main channel of the Snohomish River empty. This contention and the reason for it we have heretofore stated. In addition to what

we have already said, we desire to call attention to Article 17 of the Constitution of the State of Washington, which provides:

"The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows."

In the same article the state disclaims all title to all tide, swampy and overflow lands patented by the United States. The lands involved in this case have never been patented. Shortly after the admission of the state, it, by its Board of Tide Land Commissioners, surveyed and platted these lands and claimed to own them. This plat was filed for record and the United States never claimed any interest in these lands either as trustee for the Indians or otherwise for about twenty years. The state, more than twenty years ago, sold these lands to the grantor of the defendants, and it and its grantees have ever since that time paid the taxes thereon. It would seem from these facts that the United States has acquiesced in the state's claim of ownership, and in that way the parties themselves have construed

the boundary of the Indian Reservation at the point in dispute. Again, it is apparent from the treaty that the Government intended to give to the Indians thirty-six sections of upland with the adjoining tide lands, but nothing else, except Tulalip Bay, which is specifically granted, and Kwilt Ceda creek, which was also specifically granted. No other water was granted by the terms of the treaty, and it is the contention of the Government that the tide lands in question did not exist at the time of the executive order. Unless the Indians acquired by virtue of the treaty the water which formerly existed where the tide lands now are, they could not rightfully claim said tide lands. There is another point that sustains the defendants' contention that Ebey Slough does not extend as far south as the north boundary of the tide lands in dispute. Article II of the treaty refers to a bay called therein Hwhomish Bay, and described it as the water into which the Kwilt Ceda empties. The existence of a bay at that point precludes the idea that Ebey Slough extended southward as far as the north boundary of the tide lands in dispute.

Judge Neterer's Views

In the course of his decision Judge Neterer used the following language, (Trans., 19), which is so pertinent that we repeat it:

"According to the meander notes of the U. S. Government, the mouth of Ebey's Slough is practically at X indicated upon the sketch. The testimony shows that the land in question is a part of the tidelands which extend from and adhere to Smith Island; that these lands are separated by a deep water channel on the west and north and are independent of the reservation; that Steamboat Slough, which is navigable, is north of the land, and the water of Port Gardner is west and forms a navigable channel between the reservation and the land in question entering into Ebey's Slough. I think it must be apparent from an examination of the treaty, and likewise of the executive order, that the purpose was to grant to the Indians tillable land with such accretions as would naturally belong thereto. I do not think that it could have been the intention of the executive order to have included tide lands which were entirely separated and segregated from the uplands of the reservation. If it had been the intention to grant any special water privileges across the navigable

water upon which the reservation borders, fitting language would have been employed. A casual reading of the executive order, together with a consideration of the mouth of Ebey Slough as fixed by the United States Government notes, however, is conclusive upon the plaintiff. The mere fact that the executive order in general terms, reads, 'southeasterly' with the line of low-water mark along said shore * * * of and across the mouth of Ebey Slough to the place of beginning' cannot be read to extend across the waters of Port Gardner, but must be carried to the mouth of Ebey Slough, even though the course may not be directly southeasterly to the point of commencement."

Accretion

If it admitted that the tide lands in dispute do not adjoin the upland of the Indian Reservation. The map (Exhibit 3) shows that these tide lands adjoin Smith Island. If they were formed by accretion, then under well established principles of law they would form a part of Smith Island. If therefore, the theory suggested by the complaint to the effect that these tide lands were actually formed by alluvial deposits attaching to land out-

side the Reservation, that fact alone would defeat the plaintiff's case.

Detached Tidelands Not a Part of Reservation

Counsel for the Government in their brief under point 2, commencing at page 18, argue, that even if it be conceded that the tide lands in dispute are not within the boundaries of the Indian Reservation, they nevertheless belong to the Reservation, because they are a part of the Reservation tide lands, and because "of its ownership of the lands opposite this land on each side of the slough as one of the attributes of riparian ownership."

These propositions are so palpably unsound that it is difficult even to discuss them. A sufficient answer to the proposition that the tide lands in dispute are a part of the Reservation tide lands, even though they be outside the boundaries of the Reservation, is that it has been admitted in this suit that they do not attach to any upland of the Reservation, and therefore they cannot be a part of the Reservation tide lands, unless they lie within the boundaries of the Reservation.

The other proposition under this point stated on page 21 of the brief of plaintiff in error in these words, "finally we argue that the Government owns this triangular strip of land because of its ownership of the lands opposite this land on each side of the slough as one of the attributes of riparian ownership," is quite unintelligible, especially in view of the following admitted facts in this case:

The Snohomish River is a large navigable stream. Several miles above the property in dispute it divides into several branches. Each of these branches is a large river in itself, and they all empty into Port Gardner. One of these branches is Ebey Slough, and another is Steamboat Slough. Both of these branches empty into Port Gardner north of the tide lands in question, and their waters go out to sea through Port Gardner through a deep navigable channel lying between the main land of the Reservation west of the tide lands in dispute. The channel of Steamboat Slough continues into Port Gardner between the tide lands in dispute and the main land of the

Reservation lying northward thereof. The tide lands in dispute do not constitute an island, but attach to Smith Island, which is not a part of the Reservation. These tide lands have been formed by accretion, and they now constitute a part of Smith Island. In the Government's brief on page 19 the following statement occurs:

"This land, (the tide lands in dispute), was made by the mud and silt deposited by the slough and will undoubtedly in time become a part of the main land, by process of accretion."

It is undoubtedly a part of the main land now, but the main land in this instance is Smith Island, and not the Indian Reservation.

Continuing their argument counsel for the Government on page 21 of their brief say: "The owners of land bordering on navigable waters are entitled to any increase of the soil by accretion." With this statement we agree absolutely. In the instant case, however, all of the accretion has been to Smith Island.

Again counsel on page 21 of their brief say: "The owner of land on both sides of a river above tide waters owns the island therein to the extent of the length of his lands opposite to them." With this statement of the law we have no quarrel, but it has no application to the instant case. The tide waters extend up the Snohomish River for about ten miles above the location of the lands in dispute, and the lands in dispute do not constitute an island.

Counsel for the Government seem to think that at sometime in the future the deposit of silt coming down the Snohomish River will fill up the space between the upland of the Reservation and the tide lands in dispute, and that when that time arrives these tidelands will then belong to the Reservation, and that for that reason they should now be held to belong to the Reservation. The answer to that proposition is obvious.

Unlike some other states in that respect, the State of Washington has never claimed the ownership of tide lands attaching to an Indian Reservation, but on the other hand its administrative officers have always disclaimed any interest in such

tide lands. In one instance in a case cited in the brief of plaintiff in error, one Jones made application to the State of Washington to purchase certain tide lands, which were within the boundaries of the Tulalip Indian Reservation, but the state, through its land commissioners, rejected such application on the sole ground that the tide lands applied for were within the boundaries of the Reservation. The applicant appealed from this decision of the board of state land commissioners to the superior court of Snohomish County, which reversed the ruling of the state board and held that the lands applied for were subject to sale by the state. The state board appealed to the supreme court of the State of Washington, which reversed the decision of the superior court and held that detached tide lands within the boundaries of the Tulalip Indian Reservation did not belong to the state.

Jones v. Calvert, 32 Wash. 610.

The same board of land commissioners, however, held that the tide lands attached to Smith Island, including the tide lands in dispute herein,

were subject to sale and did sell them, and its grantees were in possession of them under such sale for more than twenty years before this action was commenced.

Conclusion

We submit that there is nothing in the record from which it can be reasonably inferred that the tide lands in question are within the boundaries of the Tulalip Indian Reservation; that it does appear from the record and from the facts of which the court is compelled to take judicial notice that these tide lands are not within the boundaries of the Reservation; that they do not attach to any part of the Reservation, but that they do attach to and form a part of Smith Island, which admittedly is not a part of the Reservation; and for these reasons we submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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Attorney for defendants in error.